

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SCOTT and RHONDA BURNETT,)
RYAN HENDRICKSON, JEROD)
BREIT, SCOTT TRUPIANO,)
JEREMY KEEL, SHELLY DREYER,)
HOLLEE ELLIS, and FRANCES)
HARVEY on behalf of themselves and)
all others similarly situated,)

Plaintiffs,)

v.)

NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF)
AMERICA, INC., BHH AFFILIATES,)
LLC, HSF AFFILIATES, LLC,)
RE/MAX LLC, and KELLER)
WILLIAMS REALTY, INC.)

Defendants.)

Case No. 4:19-cv-00332-SRB

**DEFENDANTS' MOTION *IN LIMINE* NO. 15 TO PRECLUDE EVIDENCE RELATING
TO RE/MAX, LLC'S EDUCATIONAL MATERIALS THAT WERE NOT MADE
AVAILABLE TO BROKERS OR AGENTS IN THE UNITED STATES**

INTRODUCTION

The undersigned Defendants anticipate that Plaintiffs will attempt to introduce evidence, testimony, or arguments regarding RE/MAX, LLC ("RMLLC") educational materials that should not be admitted into evidence, either because:

1. The educational materials comprise drafts that were not distributed to brokers or agents;¹ or
2. The educational materials were made available only to brokers and agents outside of the United States.²

¹ See, e.g., Ex. A (Somerville Dep.) at 85:7-10, 88:6-10; Ex. B (Dep. Ex. 947); Ex. C (Dep Ex. 954).

² See, e.g., Ex. A at 101:9-14; Ex. D (Dep Ex. 939).

Because such materials were never presented to any RE/MAX-affiliated brokers or agents operating within the United States, these materials are irrelevant to the issues before the jury, and any probative value relating to these materials (of which there is none) is substantially outweighed by the risk of confusing the issues and misleading the jury.

ARGUMENT

I. EDUCATIONAL MATERIALS THAT WERE NOT MADE AVAILABLE TO BROKERS OR AGENTS IN THE UNITED STATES ARE NOT RELEVANT AND SHOULD BE EXCLUDED UNDER FEDERAL RULES OF EVIDENCE 401 AND 402.

During the depositions of RMLLC's deponents, Plaintiffs introduced several exhibits that comprise draft educational materials that were never provided to any real estate agents or brokers, and educational materials that were only made available to agents or brokers outside of the United States. (*See, e.g.*, Ex. A at 16:1-8, 84:8-16, 86:20-24, 22:14-19; *see also* Exs. B-D.) For example, as to deposition exhibit 947, Ms. Somerville, the former Senior Vice President of Professional Development and Engagement at RMLLC, testified that these educational materials were drafts that were "never" distributed to any agent or broker. (Ex. A at 85:7-10, 88:6-10.) As to deposition exhibit 954, the cover email clearly labels the document as a draft and establishes that it is not a final version. (Ex. C.) ("At the end is information on Contracts etc. that is just pasted in and not formatted and re-written. . . . I know we will add and subtract but since I am not in tomorrow and Friday [I] wanted you to have this version."). As to deposition exhibit 939, Ms. Somerville testified that she was unaware of the educational material ever being made available to any RE/MAX-affiliated real estate brokers or agents operating within the United States. (*See* Ex. A at 101:9-14.)

Draft educational materials are entirely irrelevant to Plaintiffs' claims regarding the training of RE/MAX-affiliated agents because those materials were not made available to a

single broker or real estate agent. *See* Fed. R. Evid. 401. Indeed, District Courts in this Circuit have excluded as irrelevant draft materials that were not made available to relevant parties. *Skibniewski v. Am. Home Prods. Corp.*, No. 99-0842-CV WFJG, 2004 WL 5628157, at *10 (N.D. Mo. Apr. 1, 2004) (granting motion *in limine* to exclude evidence of “draft promotional materials that were never distributed outside the company” and “third party marketing proposals that were never implemented”).

International educational materials are also irrelevant. The conspiracy Plaintiffs allege in their Complaint relates only to the United States, not to foreign nations. (*See* Dkt. No. 759 ¶ 38 (alleging that Defendants inflated commissions “nationwide” by conspiring “across several states” and in the state of “Missouri and the Subject MLSs”).) Thus, educational materials that were made available only outside of the United States cannot be relevant to whether RMLLC entered into an alleged conspiracy in the United States, and the materials are irrelevant under Federal Rules of Evidence 401 and 402. *Unigestion Holding, S.A. v. UPM Tech., Inc.*, No. 3:15-CV-185-SI, 2022 WL 15792838, at *11 (D. Or. Oct. 28, 2022) (finding that, in a suit related to international calls between the United States and Haiti, practices, policies, and conduct in jurisdictions other than Haiti and the United States were irrelevant).

II. EDUCATIONAL MATERIALS THAT WERE NOT MADE AVAILABLE TO BROKERS OR AGENTS IN THE UNITED STATES LIKEWISE SHOULD BE EXCLUDED UNDER FEDERAL RULE OF EVIDENCE 403.

Under Federal Rule of Evidence 403 (“Rule 403”), this Court has the power to exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. Fed. R. Evid. 403; *Firemen’s Fund Ins. Co. v. Thien*, 63 F.3d 754, 759 (8th Cir. 1995). Even if the educational materials were relevant (which they are not), any marginal relevance is significantly outweighed by the risks of confusing the issues and misleading the jury.

Courts have held that the introduction of non-final drafts poses a particularly high risk of confusing the issues and misleading the jury. *See, e.g., United States v. Cody*, 114 F.3d 772, 777–78 (8th Cir. 1997) (upholding district court’s exclusion of an unofficial transcript on the grounds that it could have contained “inaccurate or incomplete information” and could have “misle[d] the jury”); *Schoolman v. UARCO, Inc.*, No. 94 C 5598, 1999 WL 47120, at *1 (N.D. Ill. Jan. 20, 1999) (granting motion *in limine* to preclude admission of draft letters due to “undisputed testimony . . . that the[] letters were never sent”). Similarly, courts have found that exhibits and testimony relating to conduct outside of the United States poses the risk of misleading the jury. *See, e.g., Unigestion Holding, S.A.*, 2022 WL 15792838, at *11.

In this case, there is a substantial risk of confusing the issues and misleading the jury if the draft educational materials, and the educational materials that were made available only outside the United States, are presented to the jury. For instance, the jury might erroneously believe that such educational materials are final versions that were made available to agents and brokers operating in the United States. Additionally, the jury may erroneously consider that evidence when determining whether RMLLC participated in the conspiracy Plaintiffs allege in the United States. This is a complex antitrust case with a number of different parties, such that there is no need to present the jury with evidence that was never distributed to any broker or agent in the United States. Accordingly, because the referenced educational materials do not provide any probative value and pose a substantial risk of confusing the issues and misleading the jury, they should be excluded under Federal Rule of Evidence 403.

CONCLUSION

For the foregoing reasons, the undersigned Defendants request that the Court grant this motion and exclude evidence or testimony concerning (1) drafts of RMLLC's educational materials that were never made available to brokers or agents, and (2) educational materials that were only made available to brokers and agents operating outside of the United States.

Dated: August 24, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, the foregoing was filed via the Court's electronic filing system, which sent notice to all counsel of record.

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